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In The Supreme Court of the United States

J. MICHAEL BROWN, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, JANIE P. MILLER, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, and KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.,

Petitioners,

v.

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, and ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Sixth Circuit err in applying *Flast v. Cohen*, 392 U.S. 83 (1968)'s "legislative enactment" nexus test when it determined the conditional Cross-Petitioners lacked federal taxpayer standing to challenge Kentucky's discretionary executive branch child care contracts with a purported "proselytizing religious organization"?

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COUNTERSTATEMENT OF THE CASE

A. Conditional Cross-Petitioners' Pleadings

On April 17, 2000, the Cross-Petitioners filed this action in the U.S. District Court for the Western District of Kentucky. Their initial Complaint did not refer to any Congressional enactment, did not name any federal defendants, did not articulate any Establishment Clause or other claim against the federal government, and did not ask for any relief against the federal government. Instead, they brought a claim against Cross-Respondents Brown and Miller (or their predecessors in office), the secretaries of two Kentucky executive branch agencies (collectively, "Kentucky") alleging that the administration of Kentucky's contracts with Cross-Respondent Kentucky Baptist Homes for Children, Inc. ("KBHC") violated the Establishment Clause. KBHC was named as a necessary party to this claim pursuant to Fed. R. Civ. P. 19. The initial Complaint focused solely on the Cross-Petitioners' status as *State* taxpayers and upon the alleged inappropriate use of *State* funds. App. 1-26, Original Complaint.

On April 16, 2003, the District Court denied Kentucky and KBHC's preliminary dispositive motions challenging the Cross-Petitioners' taxpayer standing to sue. *See* App. 27-30, Apr. 16, 2003 Order. The District Court permitted the Cross-Petitioners to file an amended complaint supplementing the factual predicate for their claimed taxpayer standing. App. at 30. This First Amended Complaint claimed that

unspecified "federal funds"[1] were used to support Kentucky's contracts with KBHC, but did not identify any specific federal legislative enactments, name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government. The gravamen of the amendment was to assert both State and federal taxpayer standing, but with no change in the substance of the claim, the parties, or the relief sought. *See* Appendix, Petition in Case No. 09-1121 ("Primary Pet. App.") at 82-126, First Amended Complaint.

On July 31, 2006, the Cross-Petitioners filed a motion to further amend their complaint, this time proffering a pleading framing KBHC as a "State actor" and demanding recoupment of all State and "federal funds" KBHC had received from Kentucky. *See* App. 31-64, July 2006 Proposed Second Amended Complaint. On January 30, 2007, the District Court denied this motion to amend in full, citing the "number of tide-shifting amendments" contained within the proposed complaint and the Cross-Petitioners' failure to justify the six-year delay in bringing these substantive amendments. *See* App. 65-69, Jan. 30,

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[1] As the Cross Petitioners acknowledge in their Cross-Petition and elsewhere, KBHC receives no "federal funds" as such from the federal government. The "federal funds" ostensibly at issue in this case are funds paid to Kentucky, which does not provide those funds directly to KBHC, but simply incorporates those funds into the State's own budget revenues.

2007 Order. This proposed pleading also failed to identify any specific federal legislative enactments, name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government.

On September 18, 2007, more than seven years after they had filed their initial Complaint, and while the parties were briefing the Cross-Respondents' renewed motions to dismiss for lack of standing in light of *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007) and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006), the Cross-Petitioners filed a third motion to amend their complaint. This motion proposed new, expanded substantive allegations and demands for relief, as well as two new paragraphs identifying federal statutes and appropriations that purportedly violated the Establishment Clause as applied to Kentucky's discretionary executive branch contracts with KBHC. This third proposed amended complaint still did not name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government. *See* App. 70-103, September 2007 Proposed Second Amended Complaint.

B. The District Court's Memorandum Opinion and Order

On March 31, 2008, the District Court issued its Memorandum Opinion and Order (Primary Pet. App. 29-51, 533 F.Supp.2d 853 (W.D. Ky. 2008)) dismissing Cross-Petitioners' Establishment Clause claims for lack of federal and State taxpayer standing. With regard to Cross-Petitioners' putative federal taxpayer standing, the District Court held:

> At best, the Amended Complaint alleges that KBHC receives funds through contracts with various Kentucky agencies. [. . .] However, the Amended Complaint fails to allege any particular appropriation, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature. [. . .] Plaintiffs cite provisions of the Social Security Act's Title IV-E program as well as Kentucky statutory provisions which authorize the Kentucky agencies to pay for the necessary care and treatment of wards of the State. *These general funding provisions are alleged to be the ultimate source of funds, but there are no allegations that these congressional actions bear any connection to the alleged constitutional violation. Indeed, they are wholly non-directive, general funding provisions.* [. . .] We conclude that the Amended Complaint, even embellished with the proposed recitation of funding sources, fails to demonstrate taxpayer standing to

> bring the Establishment Clause challenge herein.

Primary Pet. App. 47-48, 533 F.Supp.2d at 861-62 (emphasis added). The District Court accordingly granted Kentucky and KBHC's motion to dismiss for lack of standing, and denied the Cross-Petitioners' third motion to amend as futile. Primary Pet. App. 33, 47-49, 50, 533 F.Supp.2d at 862.

C. The Sixth Circuit Panel's Opinion and Judgment

On August 31, 2009, the Sixth Circuit issued an Order and Judgment (Primary Pet. App. 1-28, 579 F.3d 722 (6th Cir. 2009)) affirming the District Court in part and reversing in part. Of relevance here, the Sixth Circuit unanimously affirmed the District Court's determination that the Cross-Petitioners lacked federal taxpayer standing to sue:

> Looking at the record that was before the district court, we find that the plaintiffs have not alleged a sufficient [*Flast v. Cohen*, 392 U.S. 83 (1968) legislative enactment] nexus to show federal taxpayer standing. Even considering the proposed second amended complaint, as the district court did, the question before us is whether the plaintiffs' invocation of the Social Security Act's Title IV-E and Supplemental Security Income programs . . . as congressional authorization of funds to KBHC satisfies *Flast*. [. . .] Drawing on the fact that federal funds from these programs

> are regularly funneled to service providers in Kentucky, the plaintiffs argue that these programs are specific legislative actions for purposes of satisfying the first prong of the *Flast* test.
>
> Even though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation. These statutes are general funding provisions for childcare; they do not contemplate religious indoctrination. [. . .] While the plaintiffs do challenge congressional legislation, as required by *Flast* . . . the plaintiffs' claims are simply too attenuated to form a sufficient [*Flast* legislative enactment] nexus between the legislation and the alleged [Establishment Clause] violation.

Primary Pet. App. 17-18, 579 F.3d at 730-31.[2] The Cross-Petitioners did not seek either panel rehearing or *en banc* review of this federal taxpayer standing decision, nor did they notify the Attorney General of their purported constitutional challenge to any federal "legislative enactments" until the filing of their conditional cross-petition with this Court. Sup. Ct. R. 29(4)(b). *But see* Fed. R. Civ. P. 5.1 (requiring

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[2] The Sixth Circuit panel went on to opine that Cross-Petitioners had established State taxpayer standing to sue on these same facts (App. 19-24, 579 F.3d at 731-33); this decision is the subject of Kentucky and KBHC's petition for writ of certiorari.

such notice by challenging party at District Court level); FRAP 44(a) (requiring such notice by challenging party at Court of Appeals level); 28 U.S.C. § 2403(a) (requiring such notice at any and every judicial level).

The Sixth Circuit panel considered the Cross-Petitioners' proposed amended complaint as it related to standing, but affirmed the District Court's denial of the Cross-Petitioners' third motion to amend to the extent that the proposed pleading contained novel substantive issues. Primary Pet. App. 14-15, 579 F.3d at 729. The Cross-Petitioners did not and do not now seek any relief from the Sixth Circuit panel's holding rejecting their last proffered amendment.

REASONS TO DENY THE CROSS-PETITION

The Cross-Petitioners contend the Sixth Circuit erred in its application of the well-settled *Flast v. Cohen* "legislative enactment" nexus test for federal taxpayer standing. This assignment of error need not be addressed further, however, to resolve the *State* taxpayer standing questions raised in Kentucky and KBHC's primary petition. The courts below applied settled law, as recently reaffirmed in *Hein*, to determine that the Cross-Petitioners lacked federal taxpayer standing. No other reasons support granting certiorari on this issue. The cross-petition should be denied.

I. Kentucky and KBHC's Petition for Writ of Certiorari Does Not Require Any Re-examination of *Flast* As Applied to Federal Taxpayer Standing.

As a threshold matter, the *State* taxpayer standing questions raised in Kentucky and KBHC's petition can be fully decided without reconsidering any aspect of the Court's *federal* taxpayer standing jurisprudence.

Kentucky and KBHC's petition presents two questions for the Court: (1) whether *Flast*'s "legislative enactment" nexus test applies to plaintiffs seeking State taxpayer standing in Establishment Clause cases, and (2) if so, whether Article III gives federal courts broader authority to apply that test when analyzing potential Establishment Clause violations by State legislatures.[3]

The two-part *Flast* nexus test is universally regarded as the correct formula for federal taxpayer standing in Establishment Clause cases. *See In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), *Freedom From Religion Foundation, Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008), *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009) (post-*Hein* appellate decisions applying

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[3] As set forth at length in Kentucky and KBHC's petition, these two questions address both the principal and "alternative" holdings of the Sixth Circuit panel opinion.

Flast in federal taxpayer standing analysis); *see also Univ. of Notre Dame v. Laskowski*, 551 U.S. 1160 (2007) (GVR disposition of federal taxpayer standing Establishment Clause case for further consideration in light of *Hein*). While Cross-Petitioners quibble here with how this *Flast* test was applied by the courts below, they do not and cannot argue a different test should have been used to ascertain their federal taxpayer standing. Likewise, Kentucky and KBHC have not asked the Court to reconsider the Sixth Circuit's federal taxpayer standing analysis. Instead, Kentucky and KBHC ask the Court to consider fully how *Flast* informs State taxpayer standing to bring Establishment Clause claims in federal court. This is the only issue presented which has not been definitively resolved by the Supreme Court and which is the subject of circuit conflict in the lower courts.

While this Court may very well consider the Article III underpinnings of *Flast* when deciding if, when, and how to apply that case's "legislative enactment" nexus test to State taxpayers, nothing requires the Court to reconsider *Flast* in its indigenous federal taxpayer standing context. Indeed, that exercise was accomplished by this Court only three terms ago in *Hein,* and the Cross-Petitioners provide no reason to retread that same ground so soon. Accordingly, the Court should reject Cross-Petitioners' invitation to engage in a comprehensive re-examination of federal taxpayer standing when a narrow exegesis of *Flast*'s application *vel non* to State taxpayers would suffice.

II. Without A Federal Defendant, Cross-Petitioners' Asserted Federal Taxpayer Standing Is Immaterial and Moot.

More fundamentally, Cross-Petitioners have failed – in any of the four versions of their complaint over the decade of this litigation – to articulate a claim alleging a federal Establishment Clause violation against a federal defendant. As a result, the issue of their federal taxpayer standing is academic at best, and therefore fails to merit this Court's review.

The Cross-Petitioners' *only* Establishment Clause claim in this case alleges that "the Commonwealth of Kentucky . . . provid[ed] government funds to finance KBHC staff positions that are filled in accordance with religious tenets [. . .] and to finance KBHC services that seek to install Christian values to the youth in its care[.]" Primary Pet. App. 104, First Am. Comp. paras. 63-64. To remedy these alleged violations, Cross-Petitioners have sought the following:

> 1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;
>
> 2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;
>
> 3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any

> Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;
>
> 4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;
>
> 5. Such other relief as the Court deems just and appropriate.

(Primary Pet. App. 110, First Am. Complaint, "Request for Relief").

This relief has been sought solely against Kentucky and KBHC. The Cross-Petitioners have not named a federal defendant, articulated an Establishment Clause claim against the federal government, or asked for any relief against the federal government in this case. They do not seek a declaratory judgment that any federal statute is unconstitutional, an injunction barring the enforcement of any federal statute, or any other remedy barring any executive agency or official of the United States from disbursing funds to Kentucky or from acting or refraining to act in any other way. It is foolhardy to suggest that such monumental relief against a non-existent federal defendant would be embodied within the throwaway phrase "[s]uch other relief as the Court deems just and appropriate."

Furthermore, because the Sixth Circuit affirmed the denial of new substantive amendments to the complaint – a final, law-of-the-case decision not

challenged here – this lawsuit will *never* involve these federal parties, claims, or forms of relief. The Cross-Petitioners' original and amended Establishment Clause claims are directed solely at Kentucky. The Cross-Petitioners' "federal" standing allegations are completely untethered to any judicial mechanism that could remedy the constitutional violation the Cross-Petitioners now belatedly claim the federal government has committed. In other words, the Cross-Petitioners assert federal taxpayer standing in a vacuum, and vacuous standing does not satisfy Article III.

Undaunted by this impenetrable jurisdictional obstacle, Cross-Petitioners seek to use federal taxpayer standing as a "back-door" basis through which they might challenge any State expenditure that includes any funds originally appropriated by Congress. Given the ubiquitous nature of federal spending within and among the fifty States, this proposal would result in an unprecedented expansion of taxpayer standing. Hundreds of millions of federal taxpayers could use the federal courts to halt (and potentially reverse) any spending decision made by any State any time undifferentiated federal pass-through funds constituted even a tiny fraction of the challenged State spending.

Indeed, under the Cross-Petitioners' theory, a federal taxpayer located in Hawaii could bring suit in federal court to challenge the manner in which Maine spends its federal dollars. To date, this Court's jurisprudence has not permitted persons who "claim

that the government has violated the Establishment Clause" to exercise "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982). But if such a mindboggling reversal of basic Article III requirements is ever to be considered seriously by this or any other court, at least it should occur in a case to which the United States or one of its officials is a party and the federal government's position has been heard. That is not the case here.

The Cross-Petitioners' proposed federal taxpayer standing "by osmosis," moreover, has no support in this Court's decisions and abrogates basic Article III standing principles. To establish standing, the Cross-Petitioners must demonstrate the relief they seek will "redress or prevent actual or imminently threatened injury to [them] caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. ___, 129 S.Ct. 1142 (2009) (slip op. at 4). Here, the Cross-Petitioners only seek relief against Kentucky regarding a discrete category of public funds used to support certain KBHC staff positions. This Kentucky-specific, expenditure-specific relief will not "redress or prevent" Congress or the Secretary of Health and Human Services's past, present, or future appropriations or distributions of the Social Security Act funds that allegedly constitute the Cross-Petitioners' federal taxpayer "injury". *Cf. Flast,* 392 U.S. at 87-88 (citing plaintiffs' prayer to enjoin, *inter alia*, federal

Secretary of Health, Education and Welfare from approving any expenditure of federal funds for allegedly unconstitutional purposes); *Bowen v. Kendrick*, 487 U.S. 589, 597 (1988) (citing plaintiffs' claim for declaratory and injunctive relief against, *inter alia*, federal Secretary of Health and Human Services).

A federal court cannot determine whether a complained-of injury can be properly traced to a party that is not before it, nor can it order an absent defendant to provide redress for that injury. It is black letter law that both traceability and redressability, along with injury in fact, are irreducible requirements of Article III standing. *See, e.g., Valley Forge,* 454 U.S. at 471-72, n.9 (citing decisions). Accordingly, in *Eastern Ky. Welfare Rights Org. v. Simon*, 426 U.S. 26 (1976), the Court rejected for lack of standing a claim brought only against government officials whose tax policy had allegedly "'encouraged' hospitals to deny services to indigents." *Id.* at 42. As "no hospital [was] a defendant," there was no case or controversy in the context of the suit. *Id.* at 41. The Court summarized the constitutional issue succinctly:

> . . . [T]he "case or controversy" limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

Id.

Like the plaintiffs in *Simon*, the Cross-Petitioners seem to believe that the federal government has somehow "encouraged" other parties to misbehave by funneling Social Security Act funds to Kentucky; but even if such a theory were sufficient to bring the federal government before the courts, they have not pled it. Instead, like the plaintiffs in *Simon*, they have brought to the court a theory without a defendant. *Cf. Mitchell v. Helms*, 530 U.S. 793 (2000) (plaintiffs challenging provision of federal funds to state educational agencies named as defendants both state education officials as well as federal Secretary of Education and Department of Education) *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (plaintiffs challenging state school voucher program named only state and local officials). This failure is fatal. The Cross-Petitioners' claim is constitutionally deficient, an academic inquiry only. The Cross-Petition should be denied.

III. The Cross-Petitioners Cannot Satisfy *Flast's* Federal Taxpayer Standing Test.

A. The Courts Below Correctly Ruled Cross-Petitioners Could Not Satisfy the "Legislative Enactment" Nexus Test.

Flast requires a plaintiff to demonstrate a nexus between his or her status as a federal taxpayer and the federal "legislative enactment" that is alleged to violate the Establishment Clause. The Cross-Petitioners, however, have only alleged that *Kentucky* violated the Establishment Clause through its

maladministration of discretionary *executive branch* contracts with KBHC. The federal "legislative enactments" relied on by the Cross-Petitioners in the courts below are general, non-directive appropriations that Congress has not required or expressly contemplated would be used by States to fund "proselytizing religious providers." After these funds leave the federal coffers, they must still pass through two independent, highly discretionary levels of Kentucky State government – the Kentucky General Assembly and the Cross-Respondent Kentucky executive agencies – before they might reach KBHC (assuming a contract exists, children are placed at KBHC, and post-audit invoices for reimbursement for their care are approved). The various appropriating, contracting, and auditing decisions of these two intervening levels of Kentucky government sever any connection between Congress and KBHC. The District Court and the Sixth Circuit both recognized this, and correctly concluded that the *Flast* "legislative enactment" nexus test had not been and could not be met.

B. Cross-Petitioners Cannot Fabricate A "Legislative Enactment" Nexus Using the Charitable Choice Statute.

Undoubtedly aware of their arguments' shortcomings in the courts below, here the Cross-Petitioners attempt to cobble together a more direct "legislative enactment" claim by artificially conjoining the generic Social Security Act appropriations

referenced above with the "Charitable Choice" nondiscrimination statute, 42 U.S.C. § 604a, which the Cross-Petitioners wrongly allege "expressly requires States to include religious institutions among the recipients of [federal] funding." Cross-Petition at 8, citing 42 U.S.C. § 604a(b)-(c). The Cross-Petitioners' creative amalgam should be rejected for several reasons.

First, the Charitable Choice statute does not require States to favor religiously-affiliated child care providers over secular providers, or take any other affirmative measures to ensure that religiously-affiliated providers receive public funding. As its nickname implies, the Charitable Choice statute is a nondiscrimination statute that merely requires the government to consider all social service entities equally, without regard to their religious affiliation (if any). *See Freedom From Religion Foundation, Inc. v. McCallum*, 179 F.Supp.2d 950, 982 (W.D. Wis. 2002), *aff'd* 324 F.3d 880 (7th Cir. 2003) ("The charitable choice provisions authorize religious and faith-based organizations to participate in federally funded social service programs on the same basis as any other nongovernmental service provider."); *see also* U.S. Dept. of Health and Human Servs., "What is Charitable Choice?", available at http://www.hhs.gov/fbci/choice/html (last visited May 4, 2010) ("While Charitable Choice is designed to improve access to federal funding for faith-based organizations, it does not establish a new funding stream dedicated to these groups.").

Second, consistent with jurisprudence under the Establishment Clause, the Charitable Choice statute expressly prohibits the use of direct governmental aid for religious worship, instruction or proselytization. 42 U.S.C. § 604a(j), *McCallum*, 179 F.Supp.2d at 982. Thus, even if the Charitable Choice statute could be grafted onto other federal legislation in the manner the Cross-Petitioners propose, it could not satisfy the *Flast* "legislative enactment" nexus test because it *expressly prohibits* funding religious instruction and proselytization – the alleged conduct at the heart of the Cross-Petitioners' Establishment Clause claim.

Third, the Charitable Choice statute expressly provides that "nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations." 42 U.S.C. § 604a(k). This language ensures each State has the ultimate discretion to decide for itself whether to contract with or otherwise financially support religiously-affiliated entities, a prerogative endorsed by this Court in *Locke v. Davey*, 540 U.S. 712, 722-25 (2003). Accordingly, the alleged illegality of any State funding emanates from the State's decisions and decisionmakers, not from the Charitable Choice statute. Congress could not possibly be deemed to have *required* Kentucky to spend money on religiously-affiliated entities through the Charitable Choice statute when that very statute guarantees Kentucky an option to do otherwise.

Fourth, Kentucky's contracts with KBHC have never been negotiated or formed under the auspices of the Charitable Choice statute. Kentucky's contractual relationship with KBHC easily predates this 1996 statute, and nothing before the Court suggests, and the Cross-Petitioners have not alleged, that KBHC and Kentucky entered into their arms-length, discretionary contracts because of the statute. *See* App. 87-88 (First Am. Complaint, paras. 18-21). KBHC's payments from Kentucky for services rendered are owed exclusively to the discretion of the Cross-Respondent Kentucky executive agencies, which would be free to continue contracting with KBHC (or not) with or without federal funds supplying a portion of Kentucky's child care budget. The Charitable Choice statute has never been implicated in Kentucky's decision to contract with KBHC (and the Cross-Petitioners do not so allege), and thus cannot be used to construct a "legislative enactment" that satisfies *Flast*.[4]

Fifth, if simply superimposing the Charitable Choice statute upon a generic Congressional appropriation were able to yield federal taxpayer standing,

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[4] The Cross-Petitioners' unsupported conclusion that Charitable Choice applies in the first place to Title IV-E or XVI of the Social Security Act is belied by the fact that the United States Department of Health and Human Services does not include those statutes within the coverage of Charitable Choice. U.S. Dept. of Health and Human Servs., "Understanding the Regulations Related to the Faith-Based and Community Initiative," available at http://www.hss.gov/fbci/regulations/index.html (last visited May 11, 2010).

Flast's "narrow exception" to the general bar on taxpayer standing would quickly become the rule. Federal taxpayers nationwide would have standing to challenge any federal social services appropriation in every State, simply because that expenditure may have been made through the nondiscrimination prism of the Charitable Choice statute designed to ensure religious neutrality by the government. This is not the law. Neither of the legislative enactments espoused by the Cross-Petitioners could establish federal taxpayer standing on its own (one is a generic appropriation, and the other does not spend any money at all). The lawyer-invented combination of the two cannot do so either.

Finally, Cross-Petitioners' plan to use the Charitable Choice statute to bootstrap federal taxpayer standing was barely mentioned in the courts below, and has not been addressed in any similar form by other federal courts or any federal official within the other two branches. Accordingly, the matter has not been developed enough for this Court to address as a matter of national importance, despite brief mention in a conditional cross-petition for certiorari.

In sum, Cross-Petitioners cannot satisfy the *Flast* "legislative enactment" nexus test – with or without the Charitable Choice statute – and thus lack federal taxpayer standing. The Sixth Circuit's holding on this point was correct, as evidenced by the Cross-Petitioners' failure to seek review of that decision initially, and need not be reviewed further by this Court.

IV. The Sixth Circuit's Federal Taxpayer Standing Analysis is Consistent with This Court's Precedent.

The Sixth Circuit's federal taxpayer standing analysis is wholly consistent with *Flast*, *Bowen*, *Hein*, and this Court's other federal taxpayer standing precedents. *Flast* involved a Congressional enactment made pursuant to Article I, Section 8 of the Constitution that allegedly violated the Establishment Clause by expressly requiring federal funds to be provided to "private schools" – a term which, at that time, was functionally equivalent to "religious schools". Here, however, only Kentucky is alleged to have made an executive branch expenditure that violated the Establishment Clause. As discussed above, the only Congressional enactments implicated in the Cross-Petitioners' proposed, but not filed, pleadings are (1) generic, non-directive block-grant appropriations and authorization statutes; and (2) a nondiscrimination statute that spends no money. Neither of these enactments has any connection with the alleged Establishment Clause violations asserted by Cross-Petitioners – Kentucky's financial support of certain KBHC staff functions and services.

In *Bowen*, this Court found the plaintiffs had established federal taxpayer standing where grants were awarded to religious organizations by executive branch officials – but, as this Court later emphasized in *Hein*, "the key to that conclusion was . . . that [the Adolescent Family Life Act] was at heart a program of disbursement of funds pursuant to Congress's

taxing and spending powers," and that the *Bowen* plaintiffs' claims "call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*." *Hein*, 551 U.S. at 607, citing *Bowen*, 487 U.S. at 619-20 (emphasis added). AFLA "not only expressly authorized and appropriated specific funds for grantmaking, *it also expressly contemplated that some of those moneys might go to projects involving religious groups*." *Id.* (emphasis added).

Here, of course, there is no federal "program of disbursement" – just an *ad hoc* amalgamation of block grants to States (not to Kentucky or KBHC as such), generic authorization statutes (to help fund care for needy children nationally), and a non-discrimination statute (designed to promote religious neutrality, not preference). The Charitable Choice statute is a general provision that certainly does not "expressly contemplate" that federal funds will be awarded to fund staff positions at "proselytizing religious groups" in Kentucky. The Charitable Choice statute expressly forbids the funding of proselytization, and does not circumscribe the discretion of State public officials at all; it simply reiterates those officials' longstanding Constitutional duty not to discriminate against social service providers because of their religious affiliation. The State executive branch officials named here had no "statutory mandate" to spend federal funds in any particular manner. *Bowen* has no relevance here.

In contrast, *Hein* is highly relevant in that it illuminated and reaffirmed *Flast*'s two-part test for determining federal taxpayer standing. The *Hein* plaintiffs lacked federal taxpayer standing because, like here, the expenditures alleged to have violated the Establishment Clause "were not expressly authorized or mandated by any specific congressional enactment" made pursuant to Congress's taxing and spending powers. *Hein*, 551 U.S. at 608. Similarly, no Congressional enactment made pursuant to Article I, Section 8 expressly authorizes or acknowledges that Kentucky could spend federal funds to pay for staff positions filled in accordance with religious tenets at KBHC. Just as in *Hein*, KBHC's contractual payments here are the result of "purely discretionary Executive Branch expenditure[s]." *Id.* at 615. The Sixth Circuit's federal taxpayer standing analysis is consistent with existing law, and need not be revisited.

V. No Compelling Reasons Favor Granting Certiorari On the Cross-Petition.

As a final matter, Cross-Petitioners' conditional cross-petition fails to present any of the "compelling reasons" that it should be heard. Kentucky and KBHC's principal petition presents an acknowledged circuit split on critical Article III and federalism questions; Cross-Petitioners' conditional petition presents no circuit split at all. Kentucky and KBHC have explained that the Sixth Circuit's State taxpayer standing holding significantly expands Article III

standing in Establishment Clause cases, and contradicts several decisions of this Court. In contrast, even if the Sixth Circuit's denial of federal taxpayer standing was error, the end result would be, perforce, consistent with this Court's well-established jurisprudence requiring any exception to the general prohibition on taxpayer standing to be applied rigorously. Here, the Sixth Circuit took great care to follow *Flast*, *Bowen*, and *Hein*, and is not an outlier on the question of federal taxpayer standing. At worst, the Cross-Petitioners complain of an isolated and inconsequential misapplication of correct law by the Sixth Circuit – after having failed to seek rehearing on the matter in the court below.

In the context of State taxpayer standing, of course, the Sixth Circuit's analysis was markedly different. The Sixth Circuit strained to sidestep this Court's *Cuno* and *Hein* decisions, clinging instead to its own older circuit precedent without meaningfully considering how *Cuno* and *Hein* may have changed the landscape. The court of appeals's cramped consideration of this Court's precedent is especially disconcerting given the context of *Cuno* (where the Sixth Circuit was reversed for its expansive standing determination) and *Hein* (where the Seventh Circuit was reversed for its expansive standing determination). If this Court intended those two decisions to remind the lower courts of the rigors of Article III standing analyses, the Sixth Circuit failed to receive the message.

The Sixth Circuit is an outlier on the issue of State taxpayer standing, and its decision demands oversight by this Court to a degree not remotely akin to that requested by the Cross-Petitioners on the issue of federal taxpayer standing. A particular plaintiff's lack of federal taxpayer standing in a particular case is not an event of national consequence: it does not expand Article III judicial power, it does not impact separation of powers or federalism, it does not disrupt the national social services system, and it does not create two different standing tests for taxpayer litigants to invoke as expedient. It simply means that particular plaintiff must find a new judicial or political forum to advance his or her cause. The Court need not spend its time and resources resolving an issue that, at best, would only impact a single dispute – particularly when that dispute requires, for its resolution, a defendant that has not even been brought before the court.

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be denied.

Respectfully submitted,

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May 26, 2010

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, BOB CUNNINGHAM, JANE DOE, AND JAMES DOE	)	
Plaintiffs	)	CIVIL ACTION NO. 3:00CV-210-S
v.	)	**COMPLAINT**
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., VIOLA MILLER, SECRETARY, CABINET FOR FAMILIES AND CHILDREN, AND ROBERT STEPHENS, SECRETARY, JUSTICE CABINET	)	
Defendants	)	

INTRODUCTION

This lawsuit is brought on behalf of seven Kentucky taxpayers and one additional Plaintiff who object to and have been injured by the Commonwealth of Kentucky's funding of the Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). The KBHC uses Commonwealth funds to hire employees who are required to accept and abide by the

institution's religious beliefs, and to pay for services that seek to teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman is inconsistent with KBHC's religious beliefs. Karen Vance is barred from employment by KBHC for the same reason. Jane and James Doe are the tax-paying parents of a young man who was a resident of KBHC and was seriously damaged by KBHC's policies. Several other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their tax dollars to fund the religion-based discrimination of KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky and the Kentucky Baptist Homes for Children violate the Establishment Clause of the First Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions; 28 U.S.C. § 1343; and 42 U.S.C. §§ 2000e *et seq.* Pursuant to 28 U.S.C. § 1367, Plaintiffs request that this Court invoke its supplemental jurisdiction to

hear claims arising under state law because those claims are so related to Plaintiffs' federal claims as to form part of the same case or controversy under Article III of the United States Constitution. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a resident of Louisville, Kentucky. At all relevant times, PEDREIRA was employed as a Family Specialist at Spring Meadows Children's Home of the KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC"). At all relevant times Pedreira has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff KAREN VANCE ("Vance") is a resident of Long Beach, California.

5. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("Bos") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

8. Plaintiff BOB CUNNINGHAM ("Cunningham") is a resident of Louisville, Kentucky. At all relevant times, CUNNINGHAM has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

9. Plaintiffs JANE and JAMES DOE ("the Does") are residents of Hardin County, Elizabethtown, Kentucky. At all relevant times, the DOES have been, and continue to be, taxpayers of the Commonwealth of Kentucky. They are the parents of John Doe, a minor who was under the care of KBHC while ALICIA PEDREIRA was employed there. The true names of the DOES and John Doe are not included in this Complaint in order to protect their confidentiality.

10. Defendant KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Louisville, Kentucky.

11. Defendant VIOLA MILLER ("Miller") is the Secretary of the Cabinet for Families and Children of the Commonwealth of Kentucky. In this capacity, MILLER is responsible for approving all contracts for services between the Cabinet for Families and Children and contracting agencies, including KBHC. MILLER's actions complained of were performed and undertaken under color of Kentucky law. She is sued in her official capacity only.

12. Defendant ROBERT STEPHENS is the Secretary of the Justice Cabinet of the Commonwealth of Kentucky. In this capacity, STEPHENS is responsible for approving all contracts for services between the Justice Cabinet and contracting agencies, including KBHC. STEPHENS' actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

STATEMENT OF FACTS

13. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. She is currently employed as an intake counselor supervisor by Seven Counties Services, a Kentucky corporation that assists individuals in need of mental health services. PEDREIRA is a lesbian and is in a long-term committed relationship with her life partner, Nance Goodman.

14. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to

apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring Meadows Children's Home of KBHC on March 19, 1998.

15. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

16. PEDREIRA's job performance was outstanding throughout her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

17. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society of the Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

18. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at

present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

19. KBHC also receives financial contributions from the Kentucky Baptist Convention and from individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

20. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Families and Children and the Justice Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

21. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. The Commonwealth of Kentucky also pays for the salaries of most KBHC employees, and paid the salary for PEDREIRA's position while she was employed at KBHC.

22. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members of the Baptist Church. Among the KBHC

positions so restricted are: President, Executive Assistant to the President, Vice President of Development/Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

23. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

24. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model KBHC's version of Christian values and lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

25. KBHC requires all employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

26. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

27. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

28. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

29. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her sexual orientation was inconsistent with KBHC's religious beliefs.

30. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure

were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

31. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

32. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

33. PEDREIRA suffered farther humiliation and embarrassment as she helped the young men in her care understand and accept her termination and

worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

34. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

35. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act according to Board policy if a situation is brought to our attention.

36. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons, thus causing KBHC to make employment decisions based on religious criteria. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

37. KBHC's religion-based employment policy and its attempts to impart Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of . . . sexual orientation. . . ."

38. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions of the Kent School of Social Work and the Spalding Department of Social Work

were endorsed by the Kentucky Association of Social Work Educators. The quality of the services that KBHC provides to youth in its care has suffered as a result.

39. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

40. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religion-based and discriminatory policies. The quality of the services that KBHC provides to youth in its care has suffered as a result.

41. KAREN VANCE is a trained social worker who holds a Bachelor's degree, with a concentration in Psychology, from the University of Kentucky. She works as a senior children's social worker for the Department of Children and Family Services of Los Angeles County, where she has worked for the past fourteen years with youth like those in the care of KBHC. Her job responsibilities include performing case management, conducting crisis interventions, counseling youth and families in need, and investigating child abuse and neglect allegations.

Previously, VANCE worked with youth and families in need in a residential setting.

42. VANCE seeks to relocate to the Louisville area to be closer to her aging parents. She has applied during the past year for professional positions at institutions in the Louisville area that, like KBHC, provide services to at-risk youth.

43. There are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. VANCE would like to work at KBHC. However, VANCE has not applied to KBHC because she is lesbian. VANCE knows that her application would be futile in light of KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment because of KBHC's religious beliefs. Were it not futile, VANCE would make out a bona fide application for an available professional position at KBHC for which she is qualified.

44. Because VANCE is barred from employment with KBHC, the largest provider of services to at-risk youth in Kentucky, and because she has not been able to obtain satisfactory employment elsewhere in Louisville, she has not been able to fulfill her plans to relocate to provide increased care and company to her aging parents.

45. Despite KBHC's adoption of a religion-based employment policy and its discriminatory stance concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most

of its operating budget, including funds for staff positions. Defendant MILLER has continued to approve service contracts with KBHC on behalf of the Cabinet for Families and Children. Defendant STEPHENS has continued to approve service contracts with KBHC on behalf of the Justice Cabinet.

46. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public questioning of the Commonwealth's neutrality on religious questions.

47. One of the adolescents in PEDREIRA's care was John Doe. Doe suffered from severe emotional and behavioral disorders and had been repeatedly institutionalized prior to arriving at Spring Meadows. PEDREIRA was the first counselor who ever worked effectively with Doe, and he progressed remarkably under her care.

48. JANE and JAMES DOE wrote to KBHC and complained that their son John Doe was devastated by PEDREIRA's termination and that his care and progress had suffered from her departure. Smithwick wrote a letter to the DOES in response, stating:

> We do not believe the homosexual lifestyle is the one God intends for the human race and do not want to suggest the same to our children. . . . The purpose of our agency is to help hurting children and families through Christ-centered ministries. Having staff

> whose lifestyles demonstrate the opposite of the Judea-Christian values we build our mission upon working with our kids is a contradiction of who we are.

49. The DOES are Kentucky taxpayers, and they object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance against homosexuality.

50. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Community Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

51. JOHANNA W.H. VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

52. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of the Thomas Jefferson Unitarian Church in Louisville, Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

53. BOB CUNNINGHAM was the first Louisville chairperson of the Kentucky Alliance Against Racism and Political Repression, and currently sits on the Alliance's Board of Directors. CUNNINGHAM, who is retired, is a member of Young's Chapel, African Methodist Episcopal (AME) of Louisville. CUNNINGHAM is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

FIRST CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Miller, Stephens and Kentucky Baptist Homes for Children)

54. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 53 as if fully set out herein.

55. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

56. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes a violation of the Establishment Clause.

57. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

58. The conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

59. KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its absence may as a practical matter impair or impede its ability to protect that interest.

60. As a result of Defendants' violations of Plaintiffs' rights as taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services so long as they seek to instill Christian values and teachings to youth, in KBHC's care; (3) an order requiring KBHC to reimburse the Commonwealth of Kentucky for all Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof; and (4) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

Violation of KRS § 344.040(1) (Religion-Based Employment Discrimination) By Plaintiffs Pedreira and Vance Against Defendant KBHC)

61. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 60 as if fully set out herein.

62. KRS § 344.040(1) makes it an unlawful practice for an employer to discharge an employee, or

to refuse to consider an applicant for employment, because of religion.

63. As President and Chief Executive Officer of KBHC, Smithwick is an agent of KBHC.

64. ALICIA PEDREIRA was discharged because of her failure to hold and adhere to the religious beliefs of Defendant KBHC and Smithwick concerning homosexuality, in violation of KRS § 344.040(1). Were it not for the impermissible religious motivation of Defendant KBHC and Smithwick, acting as an agent for KBHC, PEDREIRA would not have been discharged.

65. At the time PEDREIRA was discharged, her job performance was highly satisfactory. She dutifully and faithfully performed her employment duties.

66. As a direct and proximate result of her unlawful discharge by Defendant KBHC and Smithwick, acting as an agent of KBHC, PEDREIRA has suffered and continues to suffer emotionally from humiliation and embarrassment.

67. As a direct and proximate result of the actions of Defendant KBHC and Smithwick, acting as an agent of KBHC, in unlawfully discharging PEDREIRA, she has suffered and continues to suffer other damages, including but not limited to past and future compensation; lost life insurance, health insurance, long- and short-term disability benefits; expenses involved in seeking other suitable employment; and attorney fees and costs.

68. KBHC will not consider KAREN VANCE for employment because of her failure to hold and adhere to KBHC's religious beliefs concerning homosexuality, in violation of KRS § 344.040(1), even though there are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. Were it not for the impermissible religious motivation and gross and pervasive discrimination of KBHC, VANCE would submit a bona fide application for employment.

69. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally, among other reasons, because she cannot fulfill her plan to relocate to Louisville and provide increased care and company to her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

THIRD CLAIM FOR RELIEF

Violation of 42 U.S.C. §2000e-2(a)(1) (Religion-Based Employment Discrimination) (By Plaintiff Vance Against Defendant KBHC)

70. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 69 as if fully set out herein.

71. 42 U.S.C. §2000e-2(a)(1) makes it an unlawful practice for an employer to refuse to hire an employee because of religion.

72. KAREN VANCE is barred from employment by KBHC because of her failure to hold and adhere to the religious beliefs of Defendant KBHC concerning homosexuality, in violation of 42 U.S.C. §2000e-2(a)(1). Were it not for the impermissible religious motivation and gross and pervasive discrimination of Defendant KBHC, VANCE would submit a bona fide application for a professional position at KBHC for which she is qualified.

73. KBHC has sought applicants for professional positions for which VANCE is qualified. VANCE would like to work for KBHC, but her application for employment with KBHC would be futile because VANCE is lesbian and therefore is barred from employment with KBHC.

74. The effect of KBHC's policy and practice of discriminating in employment on the basis of religion has been to deprive VANCE of equal employment opportunities.

75. VANCE is now suffering and will continue to suffer irreparable injury from KBHC's policy, practice and specific acts of discrimination as set forth herein.

76. Within 180 days of the occurrence of the acts alleged above, charges of discrimination were filed with the Equal Employment Opportunity

Commission by VANCE. VANCE is awaiting receipt of her Right-to-Sue letter.

77. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally because she cannot be reunited with her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs

REQUEST FOR RELIEF

All Plaintiffs request a jury trial on all matters so triable.

All Plaintiffs except Plaintiff VANCE request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any Commonwealth

funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;

4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;

5. Such other relief as the Court deems just and appropriate.

Plaintiff PEDREIRA requests the following additional relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

3. An award of costs, including reasonable attorney's fees, pursuant to KRS § 344.450.

4. Such other relief as the Court deems just and appropriate.

Plaintiff VANCE requests the following relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. An order declaring that KBHC's policy barring lesbians and gay men from employment violates 42 U.S.C. §2000e-2(a)(1) because it constitutes employment discrimination because of religion;

3. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

4. An award of costs, including reasonable attorney's fees, pursuant to KRS §340.450 and 42 U.S.C. §2000e *et seq*.

5. Such other relief as the Court deems just and appropriate.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, et al., PLAINTIFFS

v. CIVIL ACTION NO. 3:00-CV-210-S

KENTUCKY BAPTIST HOMES
FOR CHILDREN, INC., et al., DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the defendants, Kentucky Baptist Homes for Children, Inc. (KBHC) and Robert Stephens and Viola Miller (Stephens and Miller), for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (DN 82) Defendants challenge whether the plaintiffs, a group of state and federal taxpayers, have standing to bring an Establishment Clause challenge to the receipt of state and federal money by KBHC.

Standard of Review

When the court's subject matter jurisdiction is challenged under Rule 12, the plaintiffs have the burden of proving jurisdiction in order to survive the motion. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996); *U.S. v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). If the challenge is facial, the court must take the allegations of the complaint as true and construe them in the light most favorable to the plaintiffs. If the challenge is factual, the district court is empowered to weigh the evidence, and no

presumptions apply as to the truthfulness of plaintiffs' allegations. *U.S. v. A.D. Roe Co.*, 186 F.3d 717 (6th Cir. 1999).

A factual challenge is "not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction. On such a motion, no presumptive truthfulness applies to the factual allegations and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Ritchie*, 15 F.3d at 598. However, "the fact that the court takes evidence for the purpose of deciding the jurisdictional issue does not mean that factual findings are therefore binding in fixture proceedings." *Id.* The case at bar presents a factual challenge, as defendants question the factual basis upon which plaintiffs' alleged Establishment Clause violation rests.

In order to have standing to make an Establishment Clause challenge, a taxpayer must have a "good-faith pocketbook injury," that is a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus v. Board of Education*, 342 U.S. 429, 434-435 (1952); *Johnson v. Economic Development of City of Oakland*, 241 F.3d 501, 509 (6th Cir. 2001).

The plaintiffs assert that the specific expenditure of state and federal funds to KBHC violates the Establishment Clause. The Establishment Clause does not prohibit a state from providing any financial aid to a sectarian institution. *Johnson*, 241 F.3d at

510. What the Establishment Clause prohibits is "aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Id (internal citations omitted).*

Plaintiffs point to no instance where state money was used to fund a specifically religious activity. Therefore, standing in this case turns on whether plaintiffs have alleged that KBHC is pervasively sectarian. An institution is considered to be pervasively sectarian where "a substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

Upon our order to supplement the record, the plaintiffs filed a motion to amend their complaint to add additional factual allegations, and filed a supplemental brief with numerous exhibits.

After reviewing this information, we conclude that plaintiffs have satisfied the *Doremus* test for taxpayer standing. Plaintiffs have alleged that they are federal and Kentucky state taxpayers, and that KBHC is the recipient of federal and state funds. Plaintiffs allege that the payment of these funds to KBHC violates the Establishment Clause because KBHC is a pervasively sectarian institution. The court felt it appropriate to examine whether such allegation was mere rhetoric, or whether it had an arguable evidentiary basis. From the exhibits

submitted, we find a sufficient basis to confer taxpayer standing.

The defendant's motion for Judgment on the Pleadings (DN 82) is **DENIED**. The plaintiff's motion to amend their complaint (DN 95) will be **GRANTED** by separate order.

IT IS SO ORDERED this 16th day of April, 2003.

ENTERED BY ORDER OF COURT:

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT
JEFFREY A. APPERSON, CLERK

By: /s/ T. Burch
Deputy Clerk

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, AND BOB CUNNINGHAM Plaintiffs v. KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., MARK BIRD-WHISTELL, SECRETARY, CABINET FOR HEALTH AND FAMILY SERVICES, AND NORMAN ARFLACK, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET Defendants	CIVIL ACTION NO. 3:00-CV-210-S **SECOND AMENDED COMPLAINT** **Electronically Filed**

INTRODUCTION

This lawsuit is brought on behalf of five Kentucky taxpayers and one additional Plaintiff who object to and have been injured by the Commonwealth of Kentucky's funding of the Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). The KBHC uses Commonwealth funds to hire employees who are required to accept and abide by the institution's

religious beliefs, and to pay for services that seek to teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman is inconsistent with KBHC's religious beliefs. Karen Vance is barred from employment by KBHC for the same reason. Several other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their tax dollars to fund the religion-based discrimination of KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky and the Kentucky Baptist Homes for Children violate the Establishment Clause of the First Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions; 28 U.S.C. § 1343; and 42 U.S.C. §§ 2000e *et seq*. Pursuant to 28 U.S.C. § 1367, Plaintiffs request that this Court invoke its supplemental jurisdiction to hear claims arising under state law because those claims are so related to Plaintiffs' federal claims as to form part of the same case or controversy under Article III of the

United States Constitution. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a former resident of Louisville, Kentucky, and current resident of Florida. At all relevant times, PEDREIRA was employed as a Family Specialist at Spring Meadows Children's Home of the KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC"). At all relevant times until June 2002, Pedreira had been a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff KAREN VANCE ("Vance") is a resident of Long Beach, California.

5. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("BOS") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

8. Plaintiff BOB CUNNINGHAM ("Cunningham") is a resident of Louisville, Kentucky. At all relevant times, CUNNINGHAM has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

9. Defendant KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Louisville, Kentucky.

10. Defendant MARK BIRDWHISTELL ("Birdwhistell") is the Secretary of the Cabinet for Health and Family Services (formerly Cabinet for Families and Children) of the Commonwealth of Kentucky. In this capacity, Birdwhistell is responsible for approving all contracts for services between the Cabinet for Families and Children and contracting agencies, including KBHC. Birdwhistell's actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

11. Defendant NORMAN ARFLACK ("Arflack") is the Secretary of the Justice and Public Safety Cabinet of the Commonwealth of Kentucky. In this capacity, Arflack is responsible for approving all contracts for services between the Justice Cabinet and contracting agencies, including KBHC. Arflack's actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

12. Plaintiffs Pedreira, Simmons, Bos, Sturtevant, and Cunningham are all federal taxpayers. They have federal as well as state taxpayer standing because KBHC is the recipient of federal as well as state taxpayer dollars.

STATEMENT OF FACTS

13. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. PEDREIRA is a lesbian, and at the time her employment with KBHC was terminated, she was in a long-term committed relationship with Nance Goodman.

14. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring

Meadows Children's Home of KBHC on March 19, 1998.

15. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

16. PEDREIRA's job performance was outstanding throughout her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

17. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society of the Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

18. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

19. KBHC also receives financial contributions from the Kentucky Baptist Convention and from

individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

20. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

21. KBHC receives government funds through contracts with Kentucky state government agencies, including the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers. Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Families and Children] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other

necessities for such children committed to its care and custody." Ky. Rev. Stat. Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Health and Family Services "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky. Rev. Stat. Ann. § 605.120(1). The General Assembly has in fact regularly appropriated funds to the Cabinet for Health and Family Services and the Department of Juvenile Justice. The funds provided by the Cabinet for Health and Family Services and the Department of Juvenile Justice to KBHC consist both of state funds obtained from Kentucky taxpayers and of federal funds obtained by the federal government from federal taxpayers and given by the federal government to the Commonwealth of Kentucky.

22. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. The Commonwealth of Kentucky also pays for the salaries of most KBHC employees, and paid the salary for PEDREIRA's position while she was employed at KBHC.

23. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members

of the Baptist Church. Among the KBHC positions so restricted are: President, Executive Assistant to the President, Vice President of Development/ Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

24. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

25. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model KBHC's version of Christian values and lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

26. KBHC requires all employees to "exhibit values in their professional conduct and personal

lifestyles that are consistent with the Christian mission and purpose of the institution."

27. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

28. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

29. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

30. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her sexual orientation was inconsistent with KBHC's religious beliefs.

31. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

32. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

33. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

34. PEDREIRA suffered further humiliation and embarrassment as she helped the young men in her

care understand and accept her termination and worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

35. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

36. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act according to Board policy if a situation is brought to our attention.

37. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons, thus causing KBHC to make employment decisions based on religious criteria. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

38. KBHC's religion-based employment policy and its attempts to impart KBHC's interpretation of Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of . . . sexual orientation. . . ."

39. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions of the Kent School of Social Work and the Spalding Department of Social Work were endorsed by the

Kentucky Association of Social Work Educators. The quality of the services that KBHC provides to youth in its care has suffered as a result.

40. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

41. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religion-based and discriminatory policies. The quality of the services that KBHC provides to youth in its care has suffered as a result.

42. KAREN VANCE is a trained social worker who holds a Bachelor's degree, with a concentration in Psychology, from the University of Kentucky. She works as a senior children's social worker for the Department of Children and Family Services of Los Angeles County, where she has worked for the past seventeen years with youth like those in the care of KBHC. Her job responsibilities include performing case management, conducting crisis interventions, counseling youth and families in need, and investigating child abuse and neglect allegations. Previously, VANCE worked with youth and families in need in a residential setting.

43. VANCE seeks to relocate to the Louisville area to be closer to her aging parents. She has applied for professional positions at institutions in the Louisville area that, like KBHC, provide services to at-risk youth.

44. There are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. VANCE would like to work at KBHC. However, VANCE has not applied to KBHC because she is lesbian. VANCE knows that her application would be futile in light of KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment because of KBHC's religious beliefs. Were it not futile, VANCE would make out a bona fide application for an available professional position at KBHC for which she is qualified.

45. Because VANCE is barred from employment with KBHC, the largest provider of services to at-risk youth in Kentucky, and because she has not been able to obtain satisfactory employment elsewhere in Louisville, she has not been able to fulfill her plans to relocate to provide increased care and company to her aging parents.

46. Despite KBHC's adoption of a religion-based employment policy and its discriminatory stance concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most of its operating budget, including funds for staff positions. Defendant BIRDWHISTELL has the authority

to terminate the contract between the Cabinet for Health and Family Services and KBHC, but he has not done so, and has instead allowed the contract to be extended on July 1, 2006 and has allowed the Cabinet for Health and Family Services to continue to make payments to KBHC. Defendant ARFLACK has the authority to terminate the contract between the Justice and Public Safety Cabinet and KBHC, but he has not done so, and he has instead allowed the Justice and Public Safety Cabinet to continue to make payments to KBHC.

47. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public questioning of the Commonwealth's neutrality on religious questions.

48. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Geriatric Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

49. JOHANNA W.H. VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville

Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

50. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of the Thomas Jefferson Unitarian Church in Louisville. Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

51. BOB CUNNINGHAM was the first Louisville chairperson of the Kentucky Alliance Against Racism and Political Repression, and currently sits on the Alliance's Board of Directors. CUNNINGHAM, who is retired, is a member of Young's Chapel, African Methodist Episcopal (AME) of Louisville. CUNNINGHAM is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

52. Plaintiffs Pedreira, Simmons, Bos, Sturtevant, and Cunningham are federal taxpayers and object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality and, as both federal taxpayers and state taxpayers,

object to the receipt and use of taxpayer funds by KBHC in light of the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination.

53. KBHC is pervasively sectarian. The Baptist Children's Messenger, a publication of KBHC, says that KBHC's "efforts include permeating the environment of KBHC's programs with Christian influences such as music, magazines and Bibles, and giving children opportunities to explore spiritual matters in many different ways: Mid-week Bible studies, mission trips, camp and Christian concerns are some of the things KBHC strives to offer." As reflected in that statement, religion permeates all aspects of the lives of the youth in KBHC's care. Religion permeates their treatment, as demonstrated by statements of Jay Close, KBHC's regional minister for the Louisville area: "The goal is to integrate religious or spiritual aspects into the treatment of every child or family member that KBHC services. What we have to do is to confront them with their need for God and attempt to bring spiritual matters into their lives." Religion also permeates their extracurricular activities, such as Christian camps and speakers. Moreover, there is reason to believe that there is evidence of religious iconography on display at KBHC, and evidence that KBHC leads its staff in prayer during staff meetings. Such pervasive sectarianism is consistent with the message that KBHC sent to the community at large on its website: "We are a Christian ministry that, through God's direction and leadership,

reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values." It is also consistent with the message that KBHC sends to the community at large through its employees: "Kentucky Baptist Homes for Children is a ministry operated under the direction of a board of directors elected by the Kentucky Baptists Convention. Our mission is to provide care and hope for hurting families and children through Christ-centered ministries. Every employee is a role model for the children and families under Kentucky Baptist Homes for Children's care, therefore, employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution. Kentucky Baptist Homes for Children prohibits personal behavior which . . . interferes with KBHC's pursuit of its Christian mission and purpose." As summed up by KBHC's President William Smithwick in a news release, "[KBHC's] mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."

54. The contracts between KBHC and the Commonwealth do not restrict the use to which taxpayer dollars may be put. The Commonwealth does not prohibit the use of taxpayer dollars by KBHC for religious purposes. No safeguards, statutory, administrative,

or otherwise, exist to prevent KBHC from putting government funds to religious uses. The Commonwealth does not monitor KBHC to ensure that KBHC is not using government funds to finance religious activity. KBHC does not in any way attempt to use only private funds to pay for religious activity. KBHC uses government funds to pay the salaries of employees who engage in religious indoctrination and other religious activities as part of their duties at KBHC.

55. KBHC actually uses taxpayer dollars for religious activities, instruction, and indoctrination. For example, according to the Baptist Children's Messenger, KBHC's "goal is to keep Kentucky Baptist Homes for Children a Christ-centered agency, not just in name, but in practice." It quotes Mike Dixon, KBHC's Vice President for Religious Life, as saying, "It isn't too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot." It further quotes Dixon as saying that, of late, KBHC feels "a sense of urgency" in providing the "opportunity to experience God and accept Christ." Through an annual report, KBHC's President William Smithwick has made clear that KBHC dedicates staff resources to this goal: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ.

Because of that, we are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families. We already have one of these positions filled." This specific dedication of staff resources supplements the religious indoctrination of the youth in KBHC's care that already occurs during the course of a typical day through KBHC's direct care counselors and other staff. In addition, KBHC pressures and coerces the youth in its care to attend Baptist church services twice a week, regardless of whether they, are Baptist or even Christian. KBHC also leads the youth in its care in Christian prayer before meals; provides Bibles and other Christian literature to the youth in its care; has relationships with local churches that "come to campuses to lead Bible studies or to distribute Bibles and other materials;" makes efforts to increase the likelihood of child placement with Baptist families; and otherwise engages in religious indoctrination of the youth in its care – all regardless of whether the youth in its care are Baptist or even Christian.

56. KBHC's provision of youth services constitutes state action. KBHC provides the youth services under the terms of contractual and administrative rights and privileges granted to it by the Commonwealth of Kentucky. Most of KBHC's budget comes from contracts with the Commonwealth of Kentucky, most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or

county social workers, and most of the services provided to the youth in the care of KBHC are financed by the Commonwealth of Kentucky. The Commonwealth of Kentucky has delegated to KBHC the performance of a public function – education and rehabilitation of wards of the state. Moreover, the duties which the Commonwealth of Kentucky has delegated to KBHC – the provision of care, treatment, rehabilitation, and other services to youths who are wards of the state – are services that the Commonwealth is legally required to provide to the youths. For these reasons, the conduct of KBHC may fairly be treated as conduct of the Commonwealth of Kentucky, and is actionable under 42 U.S.C. § 1983.

57. After they learned of the circumstances of Plaintiff Pedreira's termination, the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet decided to terminate the contractual relationship between KBHC and the Commonwealth because they believed that KBHC's religious views on homosexuality were compromising the quality of care that KBHC was providing to the youth in its care. They further believed that a continued contractual relationship "[could] be construed as putting us in the position of endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." At the eleventh hour, however, Governor Paul Patton, a Southern Baptist, overruled their decision at the request of KBHC and the Baptist community at large.

FIRST CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Birdwhistell, Arflack and Kentucky Baptist Homes for Children)

58. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 57 as if fully set out herein.

59. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

60. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes a violation of the Establishment Clause.

61. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

62. As KBHC is a state actor, KBHC is violating the Establishment Clause by using government funds to support religious indoctrination and proselytization of the youths in its care and to support coercion

of the youths in its care to take part in religious activities.

63. The conduct of the Commonwealth of Kentucky and KBHC described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

64. In addition, and in the alternative, KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its absence may as a practical matter impair or impede its ability to protect that interest.

65. As a result of Defendants' violations of Plaintiffs' rights as taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC, and that KBHC is a state actor and has violated the Establishment Clause of the First Amendment of the United States Constitution by using government funds to support religious indoctrination, proselytization, and coercion; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services so long as they seek

to instill Christian values and teachings to youth in KBHC's care; (3) an order requiring KBHC to reimburse the Commonwealth of Kentucky for all Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof; (4) an order requiring KBHC to return all government funds received by it since the filing of this lawsuit to the government entities that paid out those funds, or in the alternative, an order requiring return (after an appropriate accounting, if feasible) to the paying government entities of all government funds received by KBHC since the filing of this lawsuit that were used by KBHC to support religious indoctrination, proselytization, or coercion; and (5) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

Violation of KRS § 344.040(1)
(Religion-Based Employment Discrimination)
(By Plaintiffs Pedreira and Vance
Against Defendant KBHC)

66. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 65 as if fully set out herein.

67. KRS § 344.040(1) makes it an unlawful practice for an employer to discharge an employee, or

to refuse to consider an applicant for employment, because of religion.

68. As President and Chief Executive Officer of KBHC, Smithwick is an agent of KBHC.

69. ALICIA PEDREIRA was discharged because of her failure to hold and adhere to the religious beliefs of Defendant KBHC and Smithwick concerning homosexuality, in violation of KRS § 344.040(1). Were it not for the impermissible religious motivation of Defendant KBHC and Smithwick, acting as an agent for KBHC, PEDREIRA would not have been discharged.

70. At the time PEDREIRA was discharged, her job performance was highly satisfactory. She dutifully and faithfully performed her employment duties.

71. As a direct and proximate result of her unlawful discharge by Defendant KBHC and Smithwick, acting as an agent of KBHC, PEDREIRA has suffered and continues to suffer emotionally from humiliation and embarrassment.

72. As a direct and proximate result of the actions of Defendant KBHC and Smithwick, acting as an agent of KBHC, in unlawfully discharging PEDREIRA, she has suffered and continues to suffer other damages, including but not limited to past and future compensation; lost life insurance, health insurance, long- and short-term disability benefits; expenses involved in seeking other suitable employment; and attorney fees and costs.

73. KBHC will not consider KAREN VANCE for employment because of her failure to hold and adhere to KBHC's religious beliefs concerning homosexuality, in violation of KRS § 344.040(1), even though there are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. Were it not for the impermissible religious motivation and gross and pervasive discrimination of KBHC, VANCE would submit a bona fide application for employment.

74. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally, among other reasons, because she cannot fulfill her plan to relocate to Louisville and provide increased care and company to her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

THIRD CLAIM FOR RELIEF

Violation of 42 U.S.C. §2000e-2(a)(1)
(Religion-Based Employment Discrimination)
(By Plaintiff Vance Against Defendant KBHC)

75. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 74 as if fully set out herein.

76. 42 U.S.C. §2000e-2(a)(1) makes it an unlawful practice for an employer to refuse to hire an employee because of religion.

77. KAREN VANCE is barred from employment by KBHC because of her failure to hold and adhere to the religious beliefs of Defendant KBHC concerning homosexuality, in violation of 42 U.S.C. §2000e-2(a)(1). Were it not for the impermissible religious motivation and gross and pervasive discrimination of Defendant KBHC, VANCE would submit a bona fide application for a professional position at KBHC for which she is qualified.

78. KBHC has sought applicants for professional positions for which VANCE is qualified. VANCE would like to work for KBHC, but her application for employment with KBHC would be futile because VANCE is lesbian and therefore is barred from employment with KBHC.

79. The effect of KBHC's policy and practice of discriminating in employment on the basis of religion has been to deprive VANCE of equal employment opportunities.

80. VANCE is now suffering and will continue to suffer irreparable injury from KBHC's policy, practice and specific acts of discrimination as set forth herein.

81. Within 180 days of the occurrence of the acts alleged above, charges of discrimination were filed with the Equal Employment Opportunity Commission by VANCE. VANCE is awaiting receipt of her Right-to-Sue letter.

82. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally because she cannot be reunited with her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

REQUEST FOR RELIEF

All Plaintiffs request a jury trial on all matters so triable.

All Plaintiffs except Plaintiff VANCE request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. A declaration that KBHC is a state actor and has violated the Establishment Clause of the First Amendment of the United States Constitution by using government funds to support religious indoctrination, proselytization, and coercion;

3. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

4. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;

5. An order requiring KBHC to return all government funds received by it since the filing of this lawsuit to the government entities that paid out those funds, or in the alternative, an order requiring return (after an appropriate accounting, if feasible) to the paying government entities of all government funds received by KBHC since the filing of this lawsuit that were used by KBHC to support religious indoctrination, proselytization, or coercion;

6. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. §1988;

7. Such other relief as the Court deems just and appropriate.

Plaintiff PEDREIRA requests the following additional relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

3. An award of costs, including reasonable attorney's fees, pursuant to KRS § 344.450.

4. Such other relief as the Court deems just and appropriate.

Plaintiff VANCE requests the following relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. An order declaring that KBHC's policy barring lesbians and gay men from employment violates 42 U.S.C. §2000e-2(a)(1) because it constitutes employment discrimination because of religion;

3. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

4. An award of costs, including reasonable attorney's fees, pursuant to KRS §340.450 and 42 U.S.C. §2000e *et seq*.

5. Such other relief as the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2006 I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:00CV-210-S

KENTUCKY BAPTIST HOMES
FOR CHILDREN, INC., et al. DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the plaintiffs, Alicia M. Pedreira; et al., for leave to file a Second Amended Complaint in this action alleging violations of the Establishment Clause of the First Amendment, Title VII, and the Kentucky Civil Rights Act. The defendants, Kentucky Baptist Homes for Children, Inc. ("KBHC") and the Commonwealth of Kentucky oppose the proposed amendment.

This action arose from the discharge of plaintiff Alicia Pedreira from her employment as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC. The termination statement stated that she was being terminated from KBHC "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." Pedreira's lesbian lifestyle apparently became known to KBHC when a photograph taken of her together with her acknowledged life partner was displayed at the Kentucky State Fair. In essence, the suit sought to redress alleged religious

discrimination by KBHC in its employment practices and challenged the constitutionality of the provision of federal and state monies by the Commonwealth to KBHC. Plaintiff taxpayers alleged that Kentucky's funding of KBHC violated the Establishment Clause because (1) KBHC uses public funds for religious indoctrination of the children entrusted to its care, and (2) KBHC is a pervasively sectarian institution and, as such, is ineligible to receive such funds.

The original complaint, filed in April, 2000, was tested early in the litigation through dispositive motions. In July of 2001, the court issued a ruling addressing the viability of various claims. The plaintiffs sought to interlocutorily appeal the portions of our decision which dismissed the claims of employment discrimination, and dismissed the Establishment Clause claim to the extent that it was grounded on the premise that KBHC's employment practices constituted religious discrimination. The appeals were dismissed for lack of appellate jurisdiction.

On April 16, 2003, the court entered a memorandum opinion and order finding taxpayer standing to bring an Establishment Clause challenge to the provision of state and federal funds to KBHC. Prior to ruling on this matter, the court ordered the plaintiffs to supplement the record. As noted in the memorandum opinion,

> Plaintiffs allege that the payment of these funds to KBHC violates the Establishment Clause because KBHC is a pervasively

> sectarian institution. The court felt it appropriate to examine whether such allegation was mere rhetoric, or whether it had an arguable evidentiary basis. From the exhibits submitted, we find a sufficient basis to confer taxpayer standing.

In that same order, the court permitted the filing of the plaintiffs' Amended Complaint which more particularly detailed the facts underlying the contention that KBHC is a private, pervasively sectarian institution. There is no allegation whatsoever in the Amended Complaint that KBHC is a state actor.

The plaintiffs continued through November of 2003 to premise standing, to bring their Establishment Clause claim on the pervasively sectarian doctrine. *See ie.*, DN 127. The interlocutory appeals were dismissed by the Sixth Circuit in February, 2004. Nothing was done in the case until the court ordered the filing of status reports over one year later. DN 135.

Mediation was attempted and failed, Counsel changed, parties changed, and the United States Magistrate Judge then set deadlines to urge the case along. The action has now been pending before this court for nearly seven years.

The plaintiffs seek to file a Second Amended Complaint which contains a number of tide-shifting

amendments.[1] The plaintiffs seek to assert at this late date that KBHC is a state actor, and they posit a new theory of recovery which would materially change the exposure of KBHC in this action.

The plaintiffs contend that the amendment should be permitted in accordance with Fed.R.Civ.P. 15(a) which provides that such "leave shall be freely given when justice so requires." The grant of leave to amend pursuant to this rule is, however, discretionary with the court. *See*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401, U.S. 321, *Foman v. Davis*, 371. U.S. 178, 83 S.Ct. 227, 9. L.Ed.2d 222 (1962).

As noted in *Gregory v. Mitchell*, 634 F.2d 199 (5th Cir. 1981), the court must balance the considerations of assuring a party a fair opportunity to present its claims and defenses while at the same time protecting a busy district court from being imposed upon by the presentation of theories *seriatim*. *Gregory*, 634 F.2d at 203. Here, the plaintiffs clearly had ample opportunity to present their claims. Indeed, the complaint was already amended once to further clarify and amplify the claims. The prejudice to the defendants and the imposition upon court resources in further protracting this litigation militates against our application of Rule 15(a)'s liberal amendment

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[1] The proposed Second Amended Complaint also seeks to make a number of innocuous "housekeeping" changes, to correct the names of representative parties and counsel, etc. which are not of concern to the court at this time.

policy in this case. We find undue delay here, and, significantly, no articulation of any reason for the delay in seeking these pivotal changes to the claims.[2] "At some point in time delay on the part of a plaintiff can be procedurally fatal." *Gregory*, *Id.*[3] This court therefore concludes in its discretion that amendment must be denied.

For the reasons set forth hereinabove, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the plaintiffs, for leave to file a Second Amended Complaint is **DENIED**.

January 29, 2007 /s/ C. Simpson [Seal]
Charles R. Simpson III,
Judge
United States District
Court

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[2] We reject out of hand the plaintiffs' contention that these proposed changes merely restate what was already pled in the complaint or suggested to the defendants.

[3] We find *Ziegler v. IBP Hog Market Inc.*, 249 F.3d 509 (6th Cir. 2001) to be of little value herein. The delay in seeking amendment in that case was a mere two months, thus the case is factually inapposite. Additionally, while the court cited the general rule concerning liberal application of Rule 15(a), the matter on appeal was the district court's legal conclusion concerning futility. The plaintiffs have cited no other authority in support of their motion for leave to amend.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, AND BOB CUNNINGHAM, JANE DOE, AND JAMES DOE Plaintiffs v. KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., VIOLA MILLER, SECRETARY, CABINET FOR AND FAMILIES AND CHILDREN, AND ROBERT STEPHENS, SECRETARY, JUSTICE CABINET Defendants	CIVIL ACTION NO. 3:00-CV-210-S **SECOND AMENDED COMPLAINT**

INTRODUCTION

This lawsuit is brought on behalf of seven Kentucky taxpayers and one additional Plaintiff who object to and have been injured by the Commonwealth of Kentucky's funding of the Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). The KBHC uses Commonwealth funds to hire employees who are required to accept and abide by the institution's religious beliefs, and to pay for services that seek to

teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman is inconsistent with KBHC's religious beliefs. Karen Vance is barred from employment by KBHC for the same reason. Jane and James Doe are the tax-paying parents of a young man who was a resident of KBHC and was seriously damaged by KBHC's policies. Several other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their tax dollars to fund the religion-based discrimination of KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky and the Kentucky Baptist Homes for Children violate the Establishment Clause of the First Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions; 28 U.S.C. § 1343; and 42 U.S.C. §§ 2000e *et seq*. Pursuant to 28 U.S.C. § 1367, Plaintiffs request that this Court invoke its supplemental jurisdiction to hear claims arising under state law because those claims are so

related to Plaintiffs' federal claims as to form part of the same case or controversy under Article III of the United States Constitution. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a resident of Louisville, Kentucky. At all relevant times, PEDREIRA was employed as a Family Specialist at Spring Meadows Children's Home of the KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC"). At all relevant times Pedreira has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff KAREN VANCE ("Vance") is a resident of Long Beach, California.

5. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("Bos") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

8. Plaintiff BOB CUNNINGHAM ("Cunningham") is a resident of Louisville, Kentucky. At all relevant times, CUNNINGHAM has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

9. Plaintiffs JANE and JAMES DOE ("the Does") are residents of Hardin County, Elizabethtown, Kentucky. At all relevant times, the DOES have been, and continue to be, taxpayers of the Commonwealth of Kentucky. They are the parents of John Doe, a minor who was under the care of KBHC while ALICIA PEDREIRA was employed there. The true names of the DOES and John Doe are not included in this Complaint in order to protect their confidentiality.

10. Defendant KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Louisville, Kentucky.

11. Defendant VIOLA MILLER ("Miller") is the Secretary of the Cabinet for Families and Children of the Commonwealth of Kentucky. In this capacity, MILLER is responsible for approving all contracts for services between the Cabinet for Families and Children and contracting agencies, including KBHC. MILLER's actions complained of were performed and undertaken under color of Kentucky law. She is sued in her official capacity only.

12. Defendant ROBERT STEPHENS is the Secretary of the Justice Cabinet of the Commonwealth of Kentucky. In this capacity, STEPHENS is responsible for approving all contracts for services between the Justice Cabinet and contracting agencies, including KBHC. STEPHENS' actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

13. Plaintiffs are all federal taxpayers. They have federal as well as state taxpayer standing because KBHC is the recipient of federal as well as state taxpayer dollars.

STATEMENT OF FACTS

14. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. She is currently employed as an intake counselor supervisor by Seven Counties Services, a Kentucky corporation that assists individuals in need of mental health services. PEDREIRA is

a lesbian and is in a long-term committed relationship with her life partner, Nance Goodman.

15. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring Meadows Children's Home of KBHC on March 19, 1998.

16. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

17. PEDREIRA's job performance was outstanding throughout her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

18. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society, of the

Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

19. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

20. KBHC also receives financial contributions from the Kentucky Baptist Convention and from individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

21. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Families and Children and the Justice Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

22. KBHC receives governments [sic] funds through contracts with Kentucky state government agencies, including the Cabinet for Families and Children and the Justice Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers. Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in

pursuance of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Families and Children] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody." Ky. Rev. Stat. Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Families and Children "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky. Rev. Stat. Ann. § 605.120(1). The General Assembly has in fact regularly appropriated funds to the Cabinet for Families and Children and the Department of Juvenile Justice. The funds provided by the Cabinet for Families and Children and the Department of Juvenile Justice to KBHC consist both of state funds obtained from Kentucky taxpayers and of federal funds obtained by the federal government from federal taxpayers and given by the federal government to the Commonwealth of Kentucky. The federal funds are paid pursuant to the Social Security Act's Title IV-E program, 42 U.S.C. §§ 670-79, and the Supplemental Security Income program, 42 U.S.C. §§ 1381-1383f. The statutes governing these two programs authorize the states to make payments to and enter into contracts with

private child-care providers. *See* 42 U.S.C. §§ 672(a)(1), 672(a)(2)(C), 672(b)(2), 672(c)(2), 1382(e)(1)(E), 1382(e)(1)(G), 1382c(a)(1)(C), 1382e(e)(1), 1383. Congress has regularly appropriated specific sums to fund the Title IV-E and Supplemental Security Income programs (these appropriation acts, as well as the appropriation acts by the Kentucky General Assembly that provided funds that were paid to KBHC, are described and cited in detail in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, filed in this action on August 28, 2007, and the exhibits cited therein; this Opposition and these exhibits are together incorporated by reference herein). The Title IV-E and Supplemental Security Income programs are also subject to the Charitable Choice provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193 § 104, 110 Stat. 2105 (codified at 42 U.S.C. § 604a), which expressly promotes the provision of federal funds to religious organizations, including pervasively sectarian ones.

23. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. The Commonwealth of Kentucky also pays for the salaries of most KBHC employees, and paid the salary for PEDREIRA's position while she was employed at KBHC.

24. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the

Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members of the Baptist Church. Among the KBHC positions so restricted are: President, Executive Assistant to the President, Vice President of Development/ Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

25. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

26. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model. KBHC's version of Christian values and lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

27. KBHC requires all employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

28. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

29. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

30. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

31. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her

sexual orientation was inconsistent with KBHC's religious beliefs.

32. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

33. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

34. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

35. PEDREIRA suffered further humiliation and embarrassment as she helped the young men in her care understand and accept her termination and worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

36. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

37. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act

according to Board policy if a situation is brought to our attention.

38. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons, thus causing KBHC to make employment decisions based on religious criteria. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

39. KBHC's religion-based employment policy and its attempts to impart Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of . . . sexual orientation. . . ."

40. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions

of the Kent School of Social Work and the Spalding Department of Social Work were endorsed by the Kentucky Association of Social Work Educators. The quality of the services that KBHC provides to youth is its care has suffered as a result.

41. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

42. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religion-based and discriminatory policies. The quality of the services that KBHC provides to youth in its care has suffered as a result.

43. KAREN VANCE is a trained social worker who holds a Bachelor's degree, with a concentration in Psychology, from the University of Kentucky. She works as a senior children's social worker for the Department of Children and Family Services of Los Angeles County, where she has worked for the past fourteen years with youth like those in the care of KBHC. Her job responsibilities include performing case management, conducting crisis interventions, counseling youth and families in need, and investigating child abuse and neglect allegations. Previously,

VANCE worked with youth and families in need in a residential setting.

44. VANCE seeks to relocate to the Louisville area to be closer to her aging parents. She has applied during the past year for professional positions at institutions in the Louisville area that, like KBHC, provide services to at-risk youth.

45. There are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. VANCE would like to work at KBHC. However, VANCE has not applied to KBHC because she is lesbian. VANCE knows that her application would be futile in light of KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment because of KBHC's religious beliefs. Were it not futile, VANCE would make out a bona fide application for an available professional position at KBHC for which she is qualified.

46. Because VANCE is barred from employment with KBHC, the largest provider of services to at-risk youth in Kentucky, and because she has not been able to obtain satisfactory employment elsewhere in Louisville, she has not been able to fulfill her plans to relocate to provide increased care and company to her aging parents.

47. Despite KBHC's adoption of a religion-based employment policy. and its discriminatory stance concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most of its

operating budget, including finds for staff positions. Defendant MILLER has continued to approve service contracts with KBHC on behalf of the Cabinet for Families and Children. Defendant STEPHENS has continued to approve service contracts with KBHC on behalf of the Justice Cabinet.

48. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public questioning of the Commonwealth's neutrality on religious questions.

49. One of the adolescents in PEDREIRA's care was John Doe. Doe suffered from severe emotional and behavioral disorders and had been repeatedly institutionalized prior to arriving at Spring Meadows. PEDREIRA was the first counselor who ever worked effectively with Doe, and he progressed remarkably under her care.

50. JANE and JAMES DOE wrote to KBHC and complained that their son John Doe was devastated by PEDREIRA's termination and that his care and progress had suffered from her departure. Smithwick wrote a letter to the DOES in response, stating:

> We do not believe the homosexual lifestyle is the one God intends for the human race and do not want to suggest the same to our children. . . . The purpose of our agency is to help hurting children and families through Christ-centered ministries. Having staff whose lifestyles demonstrate the opposite of the

Judea-Christian values we build our mission upon working with our kids is a contradiction of who we are.

51. The DOES are Kentucky taxpayers, and they object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance against homosexuality.

52. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Community Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

53. JOHANNA W.H. VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

54. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of

the Thomas Jefferson Unitarian Church in Louisville. Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

55. BOB CUNNINGHAM was the first Louisville chairperson of the Kentucky Alliance Against Racism and Political Repression, and currently sits on the Alliance's Board of Directors. CUNNINGHAM, who is retired, is a member of Young's Chapel, African Methodist Episcopal (AME) of Louisville. CUNNINGHAM is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

56. All Plaintiffs are federal taxpayers and object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality and, as both federal taxpayers and state taxpayers (with the exception of Plaintiff Vance), object to the receipt and use of taxpayer funds by KBHC in light of the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination.

57. KBHC is pervasively sectarian. The Baptist Children's Messenger, a publication of KBHC, says that KBHC's "efforts include permeating the environment of KBHC's programs with Christian influences such as music, magazines and Bibles, and giving

children opportunities to explore spiritual matters in many different ways: Mid-week Bible studies, mission trips, camp and Christian concerns are some of the things KBHC strives to offer." As reflected in that statement, religion permeates all aspects of the lives of the youth in KBHC's care. Religion permeates their treatment, as demonstrated by statements of Jay Close, KBHC's regional minister for the Louisville area: "The goal is to integrate religious or spiritual aspects into the treatment of every child or family member that KBHC services. What we have to do is to confront them with their need for God and attempt to bring spiritual matters into their lives." Religion also permeates their extracurricular activities, such as Christian camps and speakers. Moreover, there is reason to believe that there is evidence of religious iconography on display at KBHC, and evidence that KBHC leads its staff in prayer during staff meetings. Such pervasive sectarianism is consistent with the message that KBHC sends to the community at large on its website: "We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values." It is also consistent with the message that KBHC sends to the community at large through its employees: "Kentucky Baptist Homes for Children is a ministry operated under the direction of a board of directors elected by the Kentucky Baptists Convention. Our mission is to provide care and hope for hurting families and children through Christ-centered ministries. Every employee

is a role model for the children and families under Kentucky Baptist Homes for Children's care, therefore, employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution. Kentucky Baptist Homes for Children prohibits personal behavior which . . . interferes with KBHC's pursuit of its Christian mission and purpose." As summed up by KBHC's President William Smithwick in a news release, "[KBHC's] mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."

58. The contracts between KBHC and the Commonwealth do not restrict the use to which taxpayer dollars may be put. The Commonwealth does not prohibit the use of taxpayer dollars by KBHC for religious purposes. No safeguards, statutory, administrative, or otherwise, exist to prevent KBHC from putting government funds to religious uses. The Commonwealth does not monitor KBHC to ensure that KBHC is not using government funds to finance religious activity. KBHC does not in any way attempt to use only private funds to pay for religious activity. KBHC uses government funds to pay the salaries of employees who engage in religious indoctrination and other religious activities as part of their duties at KBHC.

59. KBHC actually uses taxpayer dollars for religious activities, instruction, and indoctrination. For example, according to the Baptist Children's Messenger, KBHC's "goal is to keep Kentucky Baptist Homes for Children a Christ-centered agency, not just in name, but in practice." It quotes Mike Dixon, KBHC's Vice President for Religious Life, as saying, "It isn't too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot." It further quotes Dixon as saying that, of late, KBHC feels "a sense of urgency" in providing the "opportunity to experience God and accept Christ." Through an annual report, KBHC's President William Smithwick has made clear that KBHC dedicates staff resources to this goal: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ. Because of that, we are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families. We already have one of these positions filled." This specific dedication of staff resources supplements the religious indoctrination of the youth in KBHC's care that already occurs during the course of a typical day through KBHC's direct care counselors and other staff. In addition, KBHC pressures and coerces the youth in its care to attend Baptist church services twice a week, regardless of

whether they are Baptist or even Christian. KBHC also leads the youth in its care in Christian prayer before meals; provides Bibles and other Christian literature to the youth in its care; has relationships with local churches that "come to campuses to lead Bible studies or to distribute Bibles and other materials;" makes efforts to increase the likelihood of child placement with Baptist families; and otherwise engages in religious indoctrination of the youth in its care – all regardless of whether the youth in its care are Baptist or even Christian.

60. After they learned of the circumstances of Plaintiff Pedreira's termination, Defendants Miller and Stephens decided to terminate the contractual relationship between KBHC and the Commonwealth because they believed that KBHC's religious views on homosexuality were compromising the quality of care that KBHC was providing to the youth in its care. They further believed that a continued contractual relationship "[could] be construed as putting us in the position of endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." At the eleventh hour, however, Governor Paul Patton, a Southern Baptist, overruled their decision at the request of KBHC and the Baptist community at large.

FIRST CLAIM FOR RELIEF
Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Miller, Stephens and Kentucky-Baptist Homes for Children)

61. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 60 as if fully set out herein.

62. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

63. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes a violation of the Establishment Clause.

64. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

65. The conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth

Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

66. Ky. Rev. Stat. Ann. § 200.115(1), Ky. Rev. Stat. Ann. § 605.120(1), 42 U.S.C. §§ 670-79 (including the particular provisions thereof cited in paragraph 22 above), 42 U.S.C. §§ 1381-1383f (including the particular provisions thereof cited in paragraph 22 above), and the appropriation acts by Congress and the Kentucky General Assembly that are referred to in paragraph 22 above are unconstitutional as applied. These statutes and appropriations acts violate the Establishment Clause as applied in the context of the provision of Commonwealth and federal funds to KBHC because these statutes and appropriations acts authorize the provision of Commonwealth and federal funds to private child-care providers (such as KBHC) but lack any restrictions or safeguards against religious use of the funds or provision of the funds to pervasively religious entities. 42 U.S.C. § 604a is likewise unconstitutional as applied. This statute violates the Establishment Clause as applied in the context of the provision of Commonwealth and federal funds to KBHC because 42 U.S.C. § 604a promotes the provision of federal funds to religious organizations (such as KBHC) but lacks sufficient restrictions and enforcement mechanisms against religious use of the funds or provision of the funds to pervasively religious entities.

67. KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be

afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its absence may as a practical matter impair or impede its ability to protect that interest.

68. As a result of Defendants' violations of Plaintiffs' rights as taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services so long as they seek to instill Christian values and teachings to youth in KBHC's care; (3) an order requiring KBHC to reimburse the Commonwealth of Kentucky for all Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof; and (4) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF
Violation of KRS § 344.040(1)
(Religion-Based Employment Discrimination)
(By Plaintiffs Pedreira and Vance
Against Defendant KBHC)

69. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 68 as if fully set out herein.

70. KRS § 344.040(1) makes it an unlawful practice for an employer to discharge an employee, or to refuse to consider an applicant for employment, because of religion.

71. As President and Chief Executive Officer of KBHC, Smithwick is an agent of KBHC.

72. ALICIA PEDREIRA was discharged because of her failure to hold and adhere to the religious belief of Defendant KBHC and Smithwick concerning homosexuality, in violation of KRS § 344.040(1). Were it not for the impermissible religious motivation of Defendant KBHC and Southwick, acting as an agent for KBHC, PEDREIRA would not have been discharged.

73. At the time PEDREIRA was discharged, her job performance was highly satisfactory. She dutifully and faithfully performed her employment duties.

74. As a direct and proximate result of her unlawful discharge by Defendant KBHC and Smithwick, acting as an agent of KBHC, PEDREIRA has suffered and continues to suffer emotionally from humiliation and embarrassment.

75. As a direct and proximate result of the actions of Defendant KBHC and Smithwick, acting as an agent of KBHC, in unlawfully discharging PEDREIRA, she has suffered and continues to suffer other damages, including but not limited to past and future compensation; lost life insurance, health insurance, long- and short-term disability benefits; expenses involved in seeking other suitable employment; and attorney fees and costs.

76. KBHC will not consider KAREN VANCE for employment because of her failure to hold and adhere to KBHC's religious beliefs concerning homosexuality, in violation of KRS § 344.040(1), even though there are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. Were it not for the impermissible religious motivation and gross and pervasive discrimination of KBHC, VANCE would submit a bona fide application for employment.

77. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally, among other reasons, because she cannot fulfill her plan to relocate to Louisville and provide increased care and company to her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

THIRD CLAIM FOR RELIEF
Violation of 42 U.S.C. §2000e-2(a)(1)
(Religion-Based Employment Discrimination)
(By Plaintiff Vance Against Defendant KBHC)

78. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 77 as if fully set out herein.

79. 42 U.S.C. §2000e-2(a)(1) makes it an unlawful practice for an employer to refuse to hire an employee because of religion.

80. KAREN VANCE is barred from employment by KBHC because of her failure to hold and adhere to the religious beliefs of Defendant KBHC concerning homosexuality, in violation of 42 U.S.C. §2000e-2(a)(1). Were it not for the impermissible religious motivation and gross and pervasive discrimination of Defendant KBHC, VANCE would submit a bona fide application for a professional position at KBHC for which she is qualified.

81. KBHC has sought applicants for professional positions for which VANCE is qualified. VANCE would like to work for KBHC, but her application for employment with KBHC would be futile because VANCE is lesbian and therefore is barred from employment with KBHC.

82. The effect of KBHC's policy and practice of discriminating in employment on the basis of religion has been to deprive VANCE of equal employment opportunities.

83. VANCE is now suffering and will continue to suffer irreparable injury from KBHC's policy, practice and specific acts of discrimination as set forth herein.

84. Within 180 days of the occurrence of the acts alleged above, charges of discrimination were filed with the Equal Employment Opportunity Commission by VANCE. VANCE is awaiting receipt of her Right-to-Sue letter.

85. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally because she cannot be reunited with her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

REQUEST FOR RELIEF

All Plaintiffs request a jury trial on all matters so triable.

All Plaintiffs except Plaintiff VANCE request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;

4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. §1988;

5. Such other relief as the Court deems just and appropriate.

Plaintiff PEDREIRA requests the following additional relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

3. An award of costs, including reasonable attorney's fees, pursuant to KRS § 344.450.

4. Such other relief as the Court deems just and appropriate.

Plaintiff VANCE requests the following relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. An order declaring that KBHC's policy barring lesbians and gay men from employment violates 42 U.S.C. §2000e-2(a)(1) because it constitutes employment discrimination because of religion;

3. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

4. An award of costs, including reasonable attorney's fees, pursuant to KRS §340.450 and 42 U.S.C. §2000e *et seq*.

5. Such other relief as the Court deems just and appropriate.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

J. MICHAEL BROWN, *et al.*,
Petitioners / Cross-Respondents,
v.
ALICIA PEDREIRA, *et al.*,
Respondents / Cross-Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION

I. The Defendants' arguments on the merits confirm the overlap between the panel's alternative holding on state-taxpayer standing and the panel's ruling on federal-taxpayer standing.

Most of the Defendants' Response Brief is devoted to arguing the merits of whether the Taxpayers have standing as federal taxpayers. The Defendants' arguments echo those that they raise in attacking the panel's alternative holding that the Taxpayers met the "legislative nexus" test as state taxpayers, further demonstrating that any analysis of the panel's alternative holding would necessarily affect the Taxpayers' federal-taxpayer standing.

For example, in their Petition, the Defendants contend that the Taxpayers lack state-taxpayer standing to challenge the state funding of Baptist Homes because Kentucky statutes do not *require* unconstitutional provision of state funds to religious organizations. Pet. 22-23, 26. Similarly, in their Response Brief, the Defendants attack the Taxpayers' federal-taxpayer standing by contending that the Title IV-E and SSI programs do not *mandate* unconstitutional spending, and that the Charitable Choice statute does not *require* state funding of religious groups and prohibits such groups from using public funds for religious worship,

instruction, or proselytization. Resp. to Cross-Pet. 17-18, 21-23.[1]

The Defendants also argue in their Petition that the Taxpayers lack state-taxpayer standing because Kentucky executive-branch officials exercise discretion over the spending of state funds. Pet. 26-27. Likewise, the Defendants argue in their Response Brief that federal-taxpayer standing fails because Kentucky officials exercise discretion over how they spend federal funds, because Kentucky officials allegedly exercised that discretion to contract with Baptist Homes prior to enactment of the Charitable Choice statute, and because the Charitable Choice statute grants States discretion not to provide *state* funds to religious organizations. Resp. to Cross-Pet. 15-16, 18-19.[2]

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[1] As explained in the Taxpayers' Brief in Opposition, the Defendants are wrong on this point. Opp. to Pet. 28-29. And in any event, the Charitable Choice statute effectively mandates that States fund religious organizations. See 42 U.S.C. 604a(b)-(c), (i). That Baptist Homes may be using federal funds in a manner contrary to the statute does not defeat standing, for in *Flast* v. *Cohen* standing was upheld even though the taxpayer plaintiffs contended that the spending they challenged was prohibited by the authorizing statute. 392 U.S. 83, 87 (1968); see also *Bowen* v. *Kendrick*, 487 U.S. 589, 614-615 (1988) (upholding standing even though religious use of federal funds was contrary to intent of authorizing statute).

[2] Again, as the Taxpayers previously explained (Opp. to Pet. 29), *Bowen* made clear that standing lies to challenge discretionary executive-branch allocations of legislatively authorized funding. 487 U.S. at 618-620. Moreover, the Defendants have not pointed to any record evidence that

In sum, in addition to lacking substantive merit, the arguments in the Defendants' Response Brief bolster the Taxpayers' point that because the panel's alternative holding on state-taxpayer standing and the panel's holding on federal-taxpayer standing raise the same issues, the Court should review the latter holding if it reviews the former.

II. No federal defendant is required when taxpayers challenge a State's misuse of federal funds.

The Defendants' Response Brief does make one argument that is wholly unrelated to the Defendants' arguments against state-taxpayer standing: that a federal defendant must be named in a challenge to the use of federal funds. Resp. to Cross-Pet. 10-15. This contention, however, is a red herring supported by neither case law nor logic.

The Defendants cite no cases that hold that taxpayers must name a federal defendant when contesting a State's use of federal funds, and the case law in fact is to the contrary. In *School District* v. *Ball*, 473 U.S. 373, 380 n.5 (1985), aff'g *Americans United for Separation of Church & State* v. *School District*, 718 F.2d 1389, 1390-91 (6th Cir. 1983), aff'g 546 F. Supp. 1071, 1074-77 (W.D. Mich. 1982), and overruled in part on other grounds by *Agostini* v. *Felton*, 521 U.S. 203 (1997), a group of taxpayers

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Kentucky began funding Baptist Homes before the Charitable Choice statute was enacted, and even if this were the case, the statute may well have affected the decisions of Kentucky officials to continue the funding. Finally, the provision in the Charitable Choice statute that grants States discretion to refuse to provide *state* funds to religious organizations does not extend to *federal* funds. See 42 U.S.C. 604a(k).

challenged a school district's use of federal, state, and local funds to support the provision of certain instruction in religious schools, without naming any federal defendants. This Court, citing both federal-taxpayer and state-taxpayer cases, upheld the taxpayers' standing, without casting any aspersions on the taxpayers' right to challenge the federal funding. 473 U.S. at 380 n.5. See also *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247, 1254 n.27, 1259 n.49 (3d Cir. 1979) (holding that no federal defendants were necessary in lawsuit challenging discrimination by private party that was unlawfully supported by federal funds).

Indeed, a federal statute and a federal rule explicitly authorize challenges to the constitutionality of federal statutes without the presence of any federal defendant. 28 U.S.C. 2403(a) and Federal Rule of Civil Procedure 5.1(a)-(b) require courts and parties to notify the Attorney General if a lawsuit places into question the constitutionality of a federal statute and no federal agency or official is a party. The Attorney General is allowed but not required to intervene (28 U.S.C. 2403(a); Fed. R. Civ. P. 5.1(c)), and so the lawsuit can proceed without federal participation. Moreover, failure to give the notice does not forfeit any constitutional claim or defense. Fed. R. Civ. P. 5.1(d); accord, *e.g.*, *In re Walters*, 868 F.2d 665, 671 n.4 (4th Cir. 1989); *Georgia Association of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 n.3 (11th Cir. 1988).

Nor is there support in logic or policy for the Defendants' argument that a federal defendant is necessary here. The Taxpayers do not challenge any federal statute facially, but instead challenge how state officials — by funding Baptist Homes — have

applied federal statutes intended to aid children and a federal statute that promotes funding of religious organizations. The constitutional violations committed by the state officials can be remedied simply by prohibiting them from funding Baptist Homes. No relief against any federal official — such as an order prohibiting federal agencies from providing funding to Kentucky — is needed here. The Defendants' proposal that state taxpayers be allowed to challenge a state's use of federal funds only when they name a federal defendant would unnecessarily complicate litigation, force plaintiffs to seek relief broader than what is needed to remedy a violation, and force federal officials to spend valuable time and resources defending lawsuits that can easily proceed without them.

CONCLUSION

The Defendants' Petition should be denied. But if it is granted, the Court should also grant the Taxpayers' Conditional Cross-Petition. Alternatively, if the Court elects to hold the Petition until after deciding *Arizona Christian School Tuition Organization* v. *Winn*, Nos. 09-987, 09-991 (cert. granted May 24, 2010) — a case cited in Defendants' Reply Brief (at 13) that also presents taxpayer-standing issues — the Court should likewise hold the Cross-Petition.

Respectfully submitted.

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